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92-538

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DONALD W. PELFRESNE,

Petitioner,

v.

VILLAGE OF WILLIAMS BAY, a Municipal Corporation, LeMARR R. LUNDBERG, President; GEORGE JOHNSON, JAMES LOVELL, RAY LOYD, PATRICIA STEVENSON, ROBERT RAYMOND, BONNIE VAN GORDER, Trustees; VIRGINIA STENUS, Clerk; and FRANK LINDLEY, Building Inspector,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Section 66.05 of the Wisconsin Statutes which mandatorily prohibits the repair or rehabilitation of a dwelling and mandatorily requires the demolition of the same if the cost of repair is "unreasonable," notwithstanding the willingness and ability of the owner to effect such repairs and rehabitation, is an invalid exercise of the state's police power under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

II. Whether the Anti-Injunction Act, 28 U.S.C. § 2283, bars a subsequent purchaser of real property from pursuing claims for injunctive relief, for money damages and for violation of his constitutional rights arising out of the actions of a municipality seeking to demolish his buildings pursuant to a court order entered in a prior proceeding to which the subsequent purchaser was not a party and where that court order did not appear in the subsequent purchaser's chain of title.

III. Whether the District Court erred in denying Pelfresne's Motion for Leave to File a Second Amended Complaint which challenged the constitutionality of Section 66.05 of the Wisconsin Statutes and the application of a court order entered pursuant to that statute against petitioner's real property.

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JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 24, 1992 in Pelfresne v. Village of Williams Bay, et al., ___ F.2d ___ (7th Cir. 1992). A timely petition with suggestions for rehearing in banc was denied on August 4, 1992, and this petition for certiorari was filed within 90 days of the docketing of the judgment of the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari is sought on behalf of petitioner Pelfresne because the United States Court of Appeals for the Seventh Circuit has rendered a decision that conflicts with this Court's decisions in Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L. Ed. 2d 677 (1987); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L. Ed. 2d 631 (1978); and Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L. Ed. 2d 222 (1962).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

United States Code, Title 28:

§ 2283, Stay of State Court Proceedings

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

United States Code, Title 42:

§ 1983, Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Wisconsin Statutes, § 66.05

STATEMENT OF THE CASE

On September 18, 1987, Petitioner Donald Pelfresne purchased a parcel of real property improved with six buildings and located in the Village of Williams Bay, Wisconsin. Shortly after completing his purchase, petitioner became aware for the first time that an order requiring the demolition of two of his buildings had been entered in a proceeding commenced by respondent Village of Williams Bay prior to his purchase of the property. The demolition or "raze" order was entered on June 25, 1986 in a state court proceeding against prior record title holders. The Village of Williams Bay did not file a lis pendens notice relating to that state Court action, nor did it docket or record the raze order in the land records of Walworth County, Wisconsin so as to put Pelfresne on notice of its claim. The raze order was entered pursuant to Section 66.05 of the Wisconsin Statutes which prohibits the repair of a dilapidated building where the cost of repair is unreasonable and requires the demolition of such buildings. The statute further creates a presumption that repairs that cost in excess of 50% of the adjusted value of the building are "unreasonable."

When Pelfresne became aware of the raze order and respondent's intent to enforce it against his property, he promptly commenced this action in the United States District Court seeking, among other things, to enjoin the defendants from demolishing his buildings. Pelfresne also attempted to make repairs to his buildings, but the respondents refused to permit the repairs to be made. Although the District Court entered a Preliminary Restraining Order on October 1, 1987, in an order dated December 4, 1987, the Court denied plaintiff-appellant's motion for a preliminary injunction. (R29) An appeal was taken from that December 4, 1987 Order. On that first appeal, the Circuit Court of Appeals affirmed the December 4, 1987 Order, but asked the District Court to determine on remand whether injunctive relief was barred by the Anti-Injunction Act, 28 U.S.C. §2283. Pelfresne v. Williams Bay, 865 F.2d 877 (7th Cir. 1989).

On August 25, 1989, on remand after the first appeal, the District Court dismissed Pelfresne's action on the ground that Pelfresne was in privity with the defendants in the prior state court proceedings. According to the District Court, Pelfresne had constructive notice of the state court proceedings when he purchased his property through the money judgment docket. (R54) This conclusion was predicated on the District Court's determination that by operation of Wisconsin law, Pelfresne had constructive notice of the state court raze order because a money judgment for $629.42 entered in that proceeding was registered (without reference to the raze order) in the Walworth County Circuit Court money judgment docket prior to his purchase of the property. The District Court also denied Pelfresne's Motion for Leave to Amend his Complaint. (R54 at 6).

Pelfresne then appealed the District Court's August 25, 1989 order of dismissal to the Court of Appeals. On November 8, 1990, the Court of Appeals reversed the District Court's August 25, 1989 decision of dismissal on the ground that under the Wisconsin conveyancing law, Pelfresne did not have constructive (record) notice of the raze order because that order was not in the chain of title of the property Pelfresne purchased. Pelfresne v. Williams Bay, 917 F.2d 1017, 1020-21, 1023 (7th Cir. 1990). The Court of Appeals remanded the case and stated that there was a factual question as to whether Pelfresne was in privity with the parties to the state court proceeding by reason of either actual or "inquiry" notice of the raze order. Id. at 1021-23.

On the second remand, the respondents moved for judgment in their favor asserting that Pelfresne had either actual notice or inquiry notice of the raze order. Pelfresne opposed the Motion and requested a jury trial on the factual issues of whether he was on notice. By Decision and Order dated May 31, 1991, the District Court granted summary judgment to the defendants on the ground that under the facts as determined by the Court, Pelfresne was deemed to be on inquiry notice and thus his claims were barred by the Anti-Injunction Act. (Decision and Order, May 31, 1991, R68 at 11-12). The District Court also denied Pelfresne's Motion for Leave to File Second Amended Com-

plaint which sought among other things a determination that the Wisconsin Statutes, Section 66.05, was unconstitutional on its face and as applied to petitioner. (Order, R73 at 2).

On June 29, 1992, the Court of Appeals affirmed the order of the District Court dismissing this case having concluded that the plaintiff was barred under the Anti-Injunction Act, 28 U.S.C. § 2283, from bringing this action and on the grounds that plaintiff's proposed second amended complaint alleging constitutional violations contained no meritorious claim. By affirming the dismissal of Pelfresne's action, Petitioner was unable to test his claim that, among other things, Section 66.05 of the Wisconsin Statutes is unconstitutional on its face and as applied to him.[1]

Under the Amended Complaint, the District Court's jurisdiction was conferred upon it pursuant to 28 U.S.C. §1331. The proposed Second Amended Complaint asserts that jurisdiction is conferred on the District Court pursuant to 28 U.S.C. §§ 1332 and 1343 in addition to § 1331.

ARGUMENT

I. Section 66.05 of the Wisconsin Statutes Which Mandatorily Prohibits the Repair or Rehabilitation of a Dwelling and Mandatorily Requires the Demolition of the Same if the Cost of Repair is Unreasonable, notwithstanding the willingness and ability of the owner to effect such repairs and rehabilitation, is an Invalid Exercise of the State's Police Power Under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The raze order which defendants imposed on Pelfresne has the effect of prohibiting the repair of a building where the cost of repair will exceed 50% of the adjusted value of the unrepaired

[1] Following the denial of Pelfresne's Motion for rehearing, the defendants razed the buildings in issue.

building. Wis. Stat. §66.05. City of Appleton v. Brunschweiler, 52 Wis. 2d 303, 190 N.W.2d 545, 547 (1971). In relevant part, Section 66.05 provides as follows:

66.05 Razing buildings; excavations

(1)(a) The governing body or the inspector of buildings or other designated officer in every municipality, except in towns situated in a county of less than 15,000 population upon complaint of a majority of the members of the town board the circuit court, may order the owner of premises upon which is located any building or part thereof within such municipality, which in its judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, and so that it would be unreasonable to repair the same, to raze and remove such building or part thereof and restore the site to a dust-free and erosion-free condition,...

(b) Whenever a municipal governing body, inspector of buildings or designated officer determines that the cost of such repairs would exceed 50 per cent of the assessed value of such building divided by the ratio of the assessed value to the recommended value as last published by the department of revenue for the municipality within which such building is located, such repairs shall be presumed unreasonable and it shall be presumed for the purposes of this section that such building is a public nuisance.

* * *

(3) Anyone affected by any such order shall within the time provided by s.893.76 apply to the circuit court for an order restraining the inspector of buildings or other designated officer from razing and removing the building or part thereof and restoring the site to a dust-free and erosion-free conditions or forever be barred. The hearing shall be held within 20 days and shall be given preference. The court shall determine whether the order of the inspector of buildings is reasonable, and if found reasonable the court shall dissolve the restraining order, and if

found not reasonable the court shall continue the restraining order or modify it as the circumstances require. Costs shall be in the discretion of the court. If the court finds that the order of the inspector of buildings is unreasonable, the inspector of buildings or other designated officer shall issue no other order under this section in regard to the same building or part thereof until its condition is substantially changed. The remedies provided in this subsection are exclusive remedies and anyone affected by such an order of the inspector shall not be entitled to recover any damages for the razing and removal of any such building and the restoration of the site to a dust-free and erosion-free condition.

* * *

Thus, the Wisconsin raze order statute links a real property owner's ability to rehabilitate and repair dilapidated housing with a dollar test. That linkage was used against Pelfresne, and his predecessors in title, to prevent them from repairing the buildings on the subject property. Here, Pelfresne offered to repair and rehabilitate the property in question. However, the Village of Williams Bay relying on Section 66.05 refused to permit the repairs and after the Court of Appeals' decision, demolished the buildings. Petitioner submits that prohibition in Section 66.05 which prevents an owner from making repairs to bring his building up to code requirements, is constitutionally invalid under the Takings Clause of the Fifth Amendment to the United States Constitution and under the Due Process Clause of the Fourteenth Amendment to the United States Constitution on each of several grounds. First, there is no "nexus" between the statute's arbitrary 50% of value/reasonableness requirement and the state's interest in assuring safe, clean housing. Nollan v. California Coastal Commission, 483 U.S. 825, 97 L.Ed. 2d 677, 107 S. Ct. 3141 (1987). Secondly, the prohibition on repair and the resulting demolition destroys the economic use of the owner's property and interferes with the owner's reasonable investment-backed expectations. Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Penn Central Transportation

Co. v. New York City, 438 U.S. 104, 124 (1978). Thirdly, the provision destroys the owner's right to employ his assets in a way he deems appropriate even though the public at large may think such use is unreasonable. The owner's right to use his assets and property in a way he deems appropriate is one of the essential sticks in the bundle of rights that are commonly characterized as property. Hodel v. Irving, 481 U.S. 704, 716 (1987); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

This case and the statute in question do not involve the power of a state to require that steps be taken immediately to abet a condition which is imminently dangerous to persons or other property. This case involves the question of whether a state by statute can prohibit an owner from bringing his building which does not represent an imminent threat to the public up to code requirements if the cost of such repair is substantial in comparison to the value of the structure.

A. Section 66.05 Does Not Substantially Advance the Legitimate State Interest Sought to be Achieved

Since at least as long ago as the City of Appleton decision, Wisconsin has recognized that a municipality is required to use the least drastic way of removing a public nuisance. Id. at 547. However, recently this Court has reformulated this principle as a requirement that the regulation "substantially advance" the "legitimate state interest" sought to be achieved. Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980). See also, Penn Central Transportation Co. v. New York City, 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L. Ed. 2d 631 (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose"). In the case of Section 66.05 the public purpose is not advanced by prohibiting an owner from making repairs even when the cost of such repairs are substantial. The public purpose is served by bringing buildings into compliance with the applicable code, regardless of whether the cost of repair is substantial or insubstantial. Petitioner submits that the nexus required by this Court is missing between the permitted goal of causing dilapi-

dated housing to be repaired and rehabilitated and the relative amount of the cost to accomplish that goal.

In Nollan, this Court assumed that legitimate public purposes were sought to be served by the easement condition and thereby the Court focused on the real issue -- does that condition imposed by the state substantially further a legitimate public purpose. In the Court's words, there must be a "nexus" between the exercise of the police-power and the asserted public purpose. Nollan, 483 U.S. at 837. A review of the teaching of Nollan suggests that states such as Wisconsin which impose dollar limitations on repairs of dilapidated buildings are not properly heeding this Court's explanation of the limits on the state's constitutional exercise of the police power.

In its analysis of the scope of restrictions which a governmental unit may place on the use of private property, this Court has articulated the test as a "nexus" between the condition and the purpose served by the condition. Id. at 837. The condition in this case (i.e., permitted repair only if cost of repair is less than 50% of adjusted value or reasonable) must serve the same governmental purpose that a rule requiring demolition of all substandard structures would serve. Assuredly the condition here fails to meet that test. For example, under the Wisconsin statute, a house having an adjusted value of $200,000 which requires $99,000 worth of repairs and is structurally unsound would not be demolished and the owner would be given an opportunity to repair without regard to the ability of the owner to expend that amount of money. On the other hand, if a more modest but structurally sound house having a value of $40,000 needed $21,000 worth of repairs, it would be presumed to be unreasonable to repair the same without regard to the overall condition of the building or the acknowledged ability of the owner to expend the funds necessary for repair. The same result occurs even if both houses are assumed to suffer from the same type of conditions. In fact, under this example, it could be concluded that the conditions in the more expensive house were much worse and posed a greater risk to the community than those in the less expensive house; yet

the owner of the expensive house would be permitted to effectuate repairs.

Instead of serving the purpose of curing health and safety hazards for the community, the 50% dollar condition has the effect of causing demolition of more modest housing stock. Proof of this contention can be shown by a simple example. If our two hypothetical houses each required the installation of a basic bathroom, kitchen and new furnace to cure health or building code violations, then improvements of a scope sufficient to meet building code requirements could cost approximately the same whether they were installed in the modest house or in the more expensive house; yet they would by definition represent a larger proportion of the value of the modest house. Thus, the cure of the building code violations and the correction of hazardous conditions has no relationship to the ratio of repair costs to building value. The required nexus is missing.

Even assuming that the Wisconsin legislature had adopted this statutory ratio formula as an attempt to route out perceived arbitrariness from issues of whose property is demolished, the attempt has failed as the formula has the effect of exacerbating arbitrariness. In order to use the police power to abridge property rights, as Wisconsin has done in Section 66.05, the Village of Williams Bay must show that the statute substantially advances a legitimate state interest. Id. at 841. As demonstrated above, the statute clearly does not pass that test. The state's interest in having housing stock that meets reasonable building and sanitation requirements is advanced by either demolishing all substandard houses regardless of their value or permitting owners to repair substandard buildings without regard to value.

Since this Court's decision in Nollan, several state courts have applied the nexus test to regulations which bar an owner from developing and using his property. For example, in Seawall Associates v. City of New York, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059 (1989), cert. den. 493 U.S. 976, 110 S. Ct. 500, New York's highest Court ruled that regulations prohibiting the development of older properties used as single room occupancy properties constitute an invalid means of com-

batting the problem of New York City's homeless. Further, the requirement that a developer contribute a ratio of 14% of his land for public roads was determined to bear no relationship to the purported public purpose in Rohn v. City of Visalia, 214 Cal. App. 3d 1463, 263 Cal. Rptr. 319 (1989).

B. The Regulatory Prohibition of Repair and the Required Demolition of Building Deprives the Owner of the Economic Use of His Property and Interferes With His Investment-Backed Expectations

In addition to the Nollan test, this Court's decision in Penn Central Transportation v. New York City, 438 U.S. 104, 124 (1978), holding in part that "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations" in determining whether there has been a regulatory taking. Id. at 124. The existing provisions of Wis. Stat. § 66.05 do not permit the taking of such expectations into account. An owner who purchases a parcel of real estate improved with a dilapidated structure valued at $60,000 which he intended to bring up to Code with a $40,000 investment would be barred for making those repairs should the municipality proceed under this section. Moreover, the demolition of his building as a result of the application of this statute would directly terminate his investment-backed expectations regarding this property and would permanently deny the owner the economic use of that portion of his property. Lucas v. South Carolina Coastal Council, __ U.S. __, 60 L.W. 4842, 4849 (No. 91-453, June 29, 1992). Nollan, 483 U.S. at 832; Hodel v. Irving, 481 U.S. 704, 716 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432-433, 102 S.Ct. 3164, 73 L. Ed. 2d 868 (1982).

C. Section 66.05 of the Wisconsin Statutes Deprives the Owner of the Right to Use His Assets to Repair His Buildings and to Bring Them Up to or in Excess of Building Code Requirements.

This Wisconsin statutory scheme also restricts how the owner of property may choose to employ his assets by prohibiting an owner from making "unreasonable" repairs. Yet, other than the statutory presumption that repairs costing more than 50% of the adjusted value of the property are unreasonable, the statute is silent as to when presumptively unreasonable repairs are reasonable. This restriction, as pointed out above, serves no public purpose, and it takes away one of the sticks from the owner's bundle of rights that comprise the concept of property. Hodel v. Irving, 481 U.S. at 716.

In the earlier case of Baker v. Mueller, 222 F.2d 180 (7th Cir. 1955), the Court of Appeals did not reach the constitutionality of Wis. Stat. § 66.05 as that Court affirmed the District Court's grant of summary judgment to the defendant municipal officers because they were immune from plaintiff's action seeking personal damages and because the state court action under Wis. Stat. § 66.05 then remained pending and plaintiff had sold the property in issue. Thus, when last before the federal courts, the condition of which Pelfresne now complains was not tested under the requirements of the United States Constitution. While the state court review in City of Appleton v. Brunschweiler, 52 Wis. 2d 303, 190 N.W. 2d 545, 547 (1971) did address the 50% of adjusted value condition, the Wisconsin Supreme Court did not rely on any federal case law and none of the state cases relied upon by the court involved a presumptive condition like the one imposed here. Moreover, state courts which have considered challenges to similar mandatory demolition statutes with percentage of repair costs to value restrictions, have held that such statutes constitute a denial of the owner's rights to due process of law. Horne v. Cordele, 140 Ga. App. 127, 230 S.E.2d 333 (1976); Johnson v. City of Paducah, 512 S.W.2d 514 (Ky. 1974); Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970). Thus, the arguments and contentions advanced by Pelfresne with respect to Wis. Stat. §66.05 will be considered for the first time in this case.

II. The Anti-Injunction Act Does Not Bar Petitioner's Claims.

The Court of Appeal's decision is predicated on its conclusion that Pelfresne was on "inquiry" notice of the raze order and therefore under Wisconsin conveyancing law he was in privity with the prior title holders and thus barred from obtaining injunctive relief by reason of the Anti-Injunction Act, 28 U.S.C. § 2283. That conclusion, however, ignores applicable Wisconsin authority that holds that a court order of the type sought to be enforced here is not notice to anyone until properly docketed, something that the Village of Williams Bay never did in this case. McKenna v. Van Blarcom, 109 Wis. 271, 85 N.W. 322, 323 (1901).

However, even if Pelfresne is in privity with his predecessor in title his claims are not barred by the Anti-Injunction Act and therefore, the Court of Appeals erred in dismissing his case. The proposed Second Amended Complaint contains allegations of present damage and violations of 42 U.S. C. § 1983. See, e.g. Counts III and V. (R70). The Anti-Injunction Act does not bar petitioner's claims brought under Section 1983 and outlined in Part I above. Mitchum v. Foster, 407 U.S. 225, 92 S.ct. 2151, 32 L.Ed 2d 705 (1972). Moreover, the Anti-Injunction Act is not a bar to his suit for damages. Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1023 (7th Cir. 1990).

Pelfresne alleges in his Second Amended Complaint that defendants have unlawfully prevented him and his predecessors in title from repairing and maintaining the property and thus deprived him of its use, including the renting of some of the buildings for profit. In all counts of the proposed Second Amended Complaint, Pelfresne has alleged a present, ongoing injury (paragraphs 19 and 22). Additional allegations of present injury are set forth in Count IV (paragraphs 44 through 49) and in Count V (paragraphs 52 through 58). Such injury to Plaintiff's rights are compensable. See e.g. Wheeler v. Pleasant Grove, 896 F.2d 1347 (11th Cir. 1990), cert. den., 456 U.S. 973 (1982) (difference in value caused by unlawful taking is one measure of damages); Video Intern. Production, Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075 (5th Cir. 1988), cert. den., 490 U.S. 1047 (1989) (damages flowing from lost income which

resulted in decrease in value allowed); Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985), app. dismd., cert. den., 474 U.S. 803 (1985) (damages for injury to professional reputation); Bonner v. Coughlin, 517 F.2d 1311, on reh., 545 F.2d 565 (7th Cir. 1976), cert. den., 435 U.S. 932 (1978) (adverse effects on status as litigant and intentional interference with property).

There being at least two exceptions to the application of the Anti-Injunction Act in this case, the Court's dismissal of the case was without merit.

III. The District Court Erred In Denying Pelfresne's Motion To File A Second Amended Complaint

By a timely filed motion Petitioner sought leave to file a Second Amended Complaint, a copy of which was tendered with the motion. The order of the District court merely denied the motion without reason. While the grant or denial of an opportunity to amend is within the sound discretion of the District Court, the outright refusal to grant the leave without any justifying reason for the denial has been held not to be an exercise of discretion but rather to be abuse of that discretion and inconsistent with the spirit of the Federal Rules of Civil Procedure. Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). This court has further held that the mandate of Fed. R. Civ. Rule 15(a) declaring that leave to amend "shall be freely given when justice so requires", is to be heeded. Id. at 182. This Court in Foman articulated the test as follows:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."

Id. at 182.

The proper purpose of pleadings is to facilitate a proper decision on the merits. Conley v. Gibson, 355 U.S. 41, 48, 78 S. Ct. 99, 2 L.Ed. 2d 80 (1957). The effect of the District Court's order denying Pelfresne leave to file an amended complaint and the Court of Appeal's affirmance is to foreclose plaintiff from challenging in this case the constitutional infirmities of the Wisconsin raze order statute.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals. Respectfully submitted,

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September 22, 1992

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 91-2861
DONALD W. PELFRESNE,

Plaintiff-Appellant,

v.

VILLAGE OF WILLIAMS BAY,
a municipal corporation,
HAROLD J. FRIESTAD, President,
GEORGE JOHNSON, VIRGINIA HASEK,
RAY LOYD, PATRICK MOORE,
ROBERT RAYMOND, BONNIE VAN GORDER,
Trustees, VIRGINIA STENUS, Clerk,
and FRANK LINDLEY, Building
Inspector,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 87-C-1109 -- John W. Reynolds, Judge.

ARGUED FEBRUARY 18, 1992 - DECIDED JUNE 24, 1992

Before POSNER and KANNE, *Circuit Judges*, and VAN SICKLE, *Senior District Judge.**

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* Hon. Bruce Van Sickle of the District of North Dakota, sitting by designation.

VAN SICKLE, *Senior District Judge*. This matter has a long history of litigation, both in the Wisconsin state courts and in the federal courts. It began in November, 1984 when the Village of Williams Bay in Walworth County, Wisconsin, brought suit in the Circuit Court of Walworth County to raze four single family houses located on property in Williams Bay that were in disrepair and believed to be unsafe. The village filed its notice of lis pendens. The suit was dismissed on a technicality and promptly refiled. No new notice of lis pendens was filed. Judgment for the city was entered on June 25, 1986. The judgment ordered the buildings razed and allowed damages and costs totalling $624.42. Pursuant to statute, the Clerk of Court prepared a judgment docket card showing the money judgment, but did not show the order to raze. On appeal that judgment was affirmed by the Wisconsin Court of Appeals, *Village of Williams Bay v. Schiessle,* 138 Wis.2d 83, 405 N.W.2d 695 (1987), and thereafter the Wisconsin Supreme Court denied further review. *Village of Williams Bay v. Schiessle*, 415 N.W.2d 162 (Wis. 1987) (Table).

Then began a litigation and title dance which has brought this matter before the Seventh Circuit three times. The litigation generated so far includes:

> *Village of Williams Bay v. Schiessle*, et al., No. 85-CV-728 (Walworth Cty. Cir. Ct. Aug. 7, 1985) (order for dismissal).
>
> *Village of Williams Bay v. Schiessle*, et al., No. 85-CV-708 (Walworth Cty. Cir. Ct. June 25, 1986) (order and judgment).
>
> *Village of Williams Bay v. Schiessle,* 183 Wis.2d 83 405 N.W.2d 695 (Wis. App. 1987).
>
> *Village of Williams Bay v. Schiessle*, 415 N.W.2d 162 (Wis. 1987) (Table).
>
> *Pelfresne v. Village of Williams Bay,* No. 87-C- 1 109 (E.D. Wis. Dec. 4, 1987) (order denying motion for preliminary injunction).

Pelfresne v. Village of Williams Bay, 865 F.2d 877 (7th Cir. 1989).

Pelfresne v. Village of Williams Bay, No. 87-C-1109 (E.D. Wis. Aug. 25, 1989) (order dismissing action as barred by Anti-Injunction Act).

Pelfresne v. Village of Williams Bay, 917 F.2d 1017 (7th Cir. 1990).

Pelfresne v. Village of Williams Bay, No. 87-C-1109 (E.D. Wis. May 31, 1991) (order dismissing action).

Pelfresne v. Village of Williams Bay, No. 87-C-1109 (E.D. Wis. July 5, 1991) (order denying motion for leave to file second amended complaint).

And now this appeal from the order of the district court which denied appellant's motion to alter or amend the May 31, 1991 order dismissing appellant's complaint, and denying a motion to file a second amended complaint.

Having been lost in the Wisconsin state courts, the matter was brought into the federal courts to be re-litigated as a diversity action requesting that the federal court enjoin execution of the state court judgment. This was accomplished by a transfer of the property to Donald W. Pelfresne, then a non-resident of Wisconsin.

The history of title and litigation, as reflected by the instruments on file and the title search by Surety Title Company shows:

December 27, 1984-Quit claim deed from Michael Schiessle to Loman D. Eley and John P. Koch executed.

December 28, 1984-Deed to Eley and Koch recorded.

February 18, 1985-Lis pendens filed in case No. 84-CV-728.

February 6, 1986-Quit claim deed from Eley and Koch to Anita Catania executed.

June 25, 1986-Judgment on raze order and costs filed in case No. 84-CV-708.

March 4, 1987-Wisconsin Court of Appeals affirms Circuit Court order.

September 15, 1987-Quit claim deed from Catania to Alan L. Verin, executed.

September 17, 1987-Quit claim deed from Eley and Koch to Catania recorded. (Fee exempt).

September 17, 1987-Quit claim deed from Catania to Alan L. Verin recorded. (Fee exempt).

September 17, 1987-Lis pendens on 85-CV-728 vacated.

September 18, 1987-Quit claim deed from Verin to Donald W. Pelfresne executed and recorded.

September 18, 1987-Title search closed.

September 28, 1987-Donald Pelfresne began this action in federal court to enjoin enforcement of the Wisconsin demolition order and for damages.

The two prior appeals to this court have reduced the problems in the case to one issue: Is the attempt to enjoin enforcement of the Wisconsin raze order prohibited by 28 U.S.C. § 2283, the Anti-Injunction Act? Critical to that issue is the question posed by this court in the second appeal and sent back to the district court for a factual resolution; whether Pelfresne was on either actual notice or inquiry notice of the Wisconsin order to raze the buildings when he took title to the property. *Pelfresne v. Village of Williams Bay,* 917 F.2d 1017, 1023 (7th Cir. 1990).

The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except an expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S. C. § 2283.

The doctrine of inquiry notice is:

> It is a general rule of law sustained by the authority of many cases that whatever fairly puts a person on inquiry with respect to an existing fact is sufficient notice of that fact if the means of knowledge are at hand. If under such circumstances one omits to inquire, he is then chargeable with all the facts which, by proper inquiry, he might have ascertained.

Illinois Central Railroad Co. v. Blaha, 3 Wis.2d 638, 89 N.W.2d 197, 201 (1958) (quoting *Zdunek v. Thomas,* 215 Wis. 11, 254 N.W. 382, 383 (1934)).

The common law rule has been codified in part into Wis. Stat. § 706-08(1)(a) and (2). However, § 706, et seq., does not relieve the purchaser of his common law duty to inquire when, apart from the circumstances recited in the notice race statute, he has or reasonably should have actual information which puts him under a duty of inquiry, *Kordecki v. Rizzo,* 106 Wis.2d 713, 317 N.W.2d 479, 483 (1982). Also, a party who seeks protection under the notice race statute must be acting in "good faith."

> This chapter shall be liberally construed, in cases of conflict or ambiguity, so as to effectuate the intentions of parties who have acted in *good faith.* (emphasis added)

Wis. Stat. § 786.101(3).

So the issue of good faith is relevant both to the question of inquiry notice and the question of application of the notice race statute. Good faith means:

> In accordance with the standards of honesty, trust, sincerity, ...

Random House Dictionary 609 (1970).

And;

> The question of privity is central to this case. Pelfresne concedes that if the raze order issued by the Circuit Court of Walworth County is a lien on the

> property that he bought, then he is in privity with the defendants in the circuit court action. He further concedes that it is a lien on the property enforceable against him if he knew about the raze order when he bought the property, or if, though he did not know about it, he is treated by Wisconsin law as if he did: in legalese, if he had "constructive notice" of the order.

Pelfresne v. Village of Williams Bay, 917 F.2d 1017,1020 (7th Cir. 1990).

In its order of May 31, 1991, the district court (1) found that a new evidentiary hearing was unnecessary because there was no dispute as to the facts surrounding Pelfresne's purchase of the property, (2) found that Pelfresne had inquiry notice of the raze order, and (3) dismissed the complaint.

While evidence was developed at hearings, the trial court based its decision on undisputed facts, so this court will view the order as a Fed.R.Civ.P. 50(b) motion, i.e., a motion by the defendant for summary judgment of dismissal. Therefore, we examine the record to determine whether the record as a whole establishes that the movant was entitled to judgment as a matter of law. *Magnuson v. City of Hickory Hills,* 933 F.2d 562 (7th Cir. 1991).

The will of Eleanor Schiessle recited that, she, a widow, had one living child, her son Michael Schiessle, and three grandchildren, Michael Pelfresne, Donald Pelfresne and Charles Pelfresne. The will distributed the residual estate 1/2 to her son and 1/2 to the Harris Trust and Savings Bank, Chicago, as trustee for her grandchildren. The original will was altered by a codicil which placed the devise and bequest to her son in a separate trust. Mrs. Schiessle designated Lommen D. Eley and James Koch as trustees of her son's trust. As to both trusts Michael Schiessle had broad general powers granted to him in the original will, except that under the codicil he could not name himself as trustee.

As recited in the will and as amended by the codicil, Michael Schiessle's general powers included:

> . . . the power to direct the trustee to sell assets of the

> trust, to direct purchase of assets for the trust, specify in what assets the trustee shall invest the trust corpus, to direct the trustee in exercising any voting rights or options, to remove the trustee at anytime and appoint another bank or trust company or an individual including himself as successor trustee, or to terminate the trust at any time. My son shall have the same powers with respect to any successor trustee.

Paragraph 7, original will, page 1, codicil.

Under the codicil, Eley and Koch were trustees of the Michael Schiessle trust, and were record title holders of the land subject to the raze order. Anita Catania and Allen L. Verin were employees of the North Shore National Bank of Chicago, a trustee for the Eleanor Schiessle trust. And Schiessle is, himself, a lawyer. From the "no fee" transfers to and from the grantees on the deeds, and from the judgment taken against Schiessle as beneficial owner in the original action, it is apparent that some form of agent or trustee relationship existed between and among the named trustees and trustee employees, and Schiessle, during the transfers which set up the transfer to Pelfresne. This evidence suggests that Michael Schiessle could and did control the numerous conveyances which occurred in the course of this litigation.

Without repeating the detailed review of the facts recited by the federal district court, *Pelfresne v. Village of Williams Bay*, No. 87-C-1109 (E.D. Wisc. May 31, 1991), we conclude that Donald Pelfresne, in his action relative to the purchase of the property, was not an independent purchaser, but simply a pawn in his uncle's game to defeat the raze order despite the finality of the Wisconsin Court judgment. The plaintiff's own testimony shows that as to the transfer to him from Verin, and as to his own initiation of the case in federal court, Pelfresne did everything his uncle told him to do. He did not even appear to exercise independent judgment when his uncle told him the case was in litigation, and then told him where to go to start the litigation. But, whatever his part, he still had the duty to make reasonable inquiry, and faced the risk of being bound to what a reasonable inquiry would have disclosed.

Had he made his own search Donald Pelfresne could have found, and had he ordered a search anytime between February 18, 1985, and September 18, 1987, at 11:15 A.M., before the deed to him was filed, he would have found; (1) a judgment against his uncle and his uncle's trustees, (2) a series of exempt transfers, and (3) a fee exempt transfer to his seller, who was an agent subject to his uncle's control.

We must conclude that any reasonable purchaser acting in his own best interests, in an arm's length transaction would have demanded a title search before closing the purchase, and would have, at the very least, demanded more information before buying the property. Having failed to make that reasonable inquiry, Pelfresne is held to notice of the money judgment and the rest of the judgment, including the raze order. He is therefore treated by the law of Wisconsin as if he did know about the raze order when he "bought" the property since he had constructive notice of the order. We also conclude that Pelfresne was not a "good faith" purchaser within the meaning of Wis. Stat. § 706-1 *et seq.* Therefore, the Anti-Injunction Act prohibits the requested action by the federal district court.

The order and judgment of dismissal of the district court is affirmed.

The plaintiff also seeks to file an amended complaint claiming various constitutional issues of no merit. As to them, the order and judgment of the district court denying the motion to amend is also affirmed.

AFFIRMED

A true Copy:

Teste:

_____

Clerk of the United States Court of
Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

DONALD W. PELFRESNE,
Plaintiff, Civil Action No. 87-C-1109

v.

VILLAGE OF WILLIAMS BAY,
a municipal corporation, Lemarr
R. LUNDBERG, President;
GEORGE JOHNSON, JAMES LOVELL,
RAY LOYD, PATRICIA STEVENSON,
ROBERT RAYMOND, BONNIE VAN GORDER,
Trustees; VIRGINIA STENUS, Clerk;
FRANK LINDLEY, Building Inspector,
Defendant.

ORDER

On November 8, 1990, the Seventh Circuit Court of Appeals remanded the above-captioned action to this court "for a determination of whether [Donald) Pelfresne [the plaintiff) was on inquiry [or actual) notice" of the existence of the raze order affecting the property he purchased on September 18, 1987. Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1023 (7th Cir. 1990). The court of appeals, however, affirmed this court's August 25, 1989 denial of plaintiff Donald Pelfresne's ("Pelfresne") motion to amend his complaint. Id.

On May 31, 1991, after the parties filed briefs pertaining to the remand, this court: (1) found that a new evidentiary hearing was unnecessary because there is no dispute as to the material facts surrounding Pelfresne's purchase of the property in question; (2) held that under Wisconsin law and in accordance with the Seventh Circuit Court of Appeal's November 8th decision Pelfresne had inquiry notice of the raze order involving the prop-

erty he purchased; and (3) dismissed Pelfresne's complaint. Pelfresne v. Williams Bay, No. 87-C-1109, 3 (E.D. Wis. May 31, 1991).

On June 10, 1991, Pelfresne moved this court to alter or amend the May 31, 1991 judgment pursuant to Rule 52(b) of the Federal Rules of Civil Procedure and for leave to file a second amended complaint. Pelfresne finished filing briefs in support of his two motions on June 19, 1991. Essentially, Pelfresne argues that this court's May 31, 1991 decision should be vacated because it is replete with mistakes of law and fact and that he should be allowed to file a second amended complaint alleging damages against the defendants. Pelfresne's arguments, however, are unpersuasive.

IT IS THEREFORE ORDERED that plaintiff Donald W. Pelfresne's Motion to alter or amend this court's May 31, 1991 decision and judgment is DENIED.

IT IS FURTHER ORDERED that plaintiff Donald W. Pelfresne's Motion for leave to file a second amended complaint is DENIED.

Dated at Milwaukee, Wisconsin, this 5th day of July, 1991.

BY THE COURT:

John W. Reynolds
Senior Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

DONALD W. PELFRESNE,
Plaintiff,

v. Civil Action No. 87-C-1109

VILLAGE OF WILLIAMS BAY,
a municipal corporation, Lemarr
R. LUNDBERG, President;
GEORGE JOHNSON, JAMES LOVELL,
RAY LOYD, PATRICIA STEVENSON,
ROBERT RAYMOND, BONNIE VAN GORDER,
Trustees; VIRGINIA STENUS, Clerk;
FRANK LINDLEY, Building Inspector,
Defendant.

DECISION AND ORDER

BACKGROUND

On August 25, 1989, after an evidentiary hearing which was held on June 6, 1989, this court dismissed plaintiff Donald W. Pelfresne's ("Pelfresne") complaint against the above-captioned defendants (hereinafter "Williams Bay") and denied his request for leave to amend his complaint. Pelfresne was seeking to enjoin Williams Bay from executing a Walworth County Wisconsin Circuit Court raze order which permitted Williams Bay to demolish certain buildings which are located on property which Pelfresne had purchased on September 18, 1987. This court held that Pelfresne's action against Williams Bay was barred by the Anti-Injunction Act, Title 28 United States Code § 2283, because Pelfresne had constructive notice of the raze order when he purchased the property thereby placing him in privity with the parties of the state court proceeding. County of Imperial v. Munoz, 449 U.S. 54 (1980). This court found that Pelfresne had

constructive notice by applying Wisconsin law. On September 22, 1989, Pelfresne appealed this court's decision.

On November 8, 1990, the Seventh Circuit Court of Appeals overruled this court's August 25, 1989 decision to dismiss Pelfresne's complaint. Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1023 (7th Cir. 1990). The court of appeals held that under Wisconsin law Pelfresne did not have constructive notice of the raze order because Wisconsin law dictates that the raze order was not in the statutory definition of the chain of title of the property Pelfresne purchased. Id. at 1020-21. The court, however, stated that Pelfresne would be in privity with the parties of the state court proceeding if he had either actual or inquiry notice of the raze order. Id. at 1021-23. Actual notice is self-explanatory, and the court of appeals stated that inquiry notice under Wisconsin law is determined by whether or not a reasonable inquiry into the title of the property would have uncovered the existence of the raze order. Id. at 1022. The court of appeals then remanded this action to this court "for a determination of whether Pelfresne was on inquiry [or actual] notice" of the existence of the raze order. Id. at 1023. The court, however, affirmed this court's denial of Pelfresne's motion to amend his complaint. Id.

On January 22, 1991, Williams Bay moved this court to find that Pelfresne had actual and inquiry notice of the raze order and to dismiss Pelfresne's complaint. This court received the file in this action from the court of appeals on January 28, 1991, and on April 9, 1991, the parties completed the briefing on Williams Bay's motion to dismiss. This court (1) finds that a new evidentiary hearing is unnecessary because there is no dispute as to the facts surrounding Pelfresne's purchase of the property; (2) holds that under Wisconsin law Pelfresne had inquiry notice of the raze order involving the property he purchased; and (3) dismisses Pelfresne's complaint.

FACTS

The facts surrounding the chain of title of the property Pelfresne purchased on September 18, 1984, (sic) are not in dispute and were outlined by this court in its August 25, 1989 deci-

sion and order and by the Seventh Circuit Court of Appeals in its November 8, 1990 decision and order. See Pelfresne v. Williams Bay, No. 87-C-1109, 2-4 (E.D. Wis. Aug. 25, 1989); Pelfresne, 917 F.2d at 1018-19. These decisions, however, did not describe in detail the inquiry Pelfresne made about the property prior to deciding to purchase it. These facts are critical in determining whether or not Pelfresne had inquiry notice of the raze order involving the property.

Pelfresne first learned that the Williams Bay property was for sale on either September 16 or 17, 1987, one or two days prior to his making the purchase on September 18, 1987 (Nov. 5, 1987 Pelfresne Dep. at 13, 20). At that time, Pelfresne was a 19-year old college student attending Embry-Riddle University in Prescott, Arizona (Id. at 3-7). Pelfresne claims that on either September 16th or 17th, his uncle, Michael Schiessle ("Schiessle"), telephoned Pelfresne from Illinois and recommended that Pelfresne purchase a piece of Williams Bay resort land as an investment (Id. at 14).

Although Schiessle was not the owner of the property at the time he called his nephew, Schiessle was the sole-owner of the property in November 1984 when Williams Bay commenced a state court action against him to have some of the buildings on the property demolished (Id.; Complaint Exh. D [Sept. 18, 1987 Security Title Company Title Search of the property)). In addition, the record indicates that (1) Schiessle directly and thoroughly controlled those individuals or trusts which purchased and sold the property during the course of the state court action; and (2) that Schiessle was an active participant in the state court action and completely aware of the presence of the raze order. See Pelfresne, 917 F.2d at 1019. Pelfresne, however, claims that his uncle Schiessle never revealed any of this information to him prior to his purchasing the property.

Pelfresne claims that his uncle Schiessle told him: (1) the property was owned by Allen Veren ("Veren"); (2) that Pelfresne should tender a check for $60,000 to Veren for the property; (3) that Pelfresne should Federal Express the check to Schiessle's wife, Barbara, in Illinois; and (4) that Schiessle would transfer

$60,000 from a trust of which Pelfresne was a beneficiary to Pelfresne's checking account to cover the check (Pelfresne Dep. at 11-21). Pelfresne did exactly as his uncle Schiessle told him to do and he became the legal owner of the property on September 18, 1987 (Id. at 21-24; Complaint Exh. D).

Pelfresne also claims that prior to purchasing the property he: (1) did not conduct a title search on the property, (2) did not visit the property to assess its value for himself, (3) did not ask his uncle if $60,000 was a fair or negotiable price, (4) did not ask his uncle about any other terms or conditions of the transaction, (5) did not ask his uncle why the property was for sale, (6) did not ask his uncle what buildings, if any, were located on the property, (7) did not ask his uncle what knowledge, if any, he had about the property, and (8) did not ask his uncle who Veren was or why Veren wanted to sell property which was such a good investment (Pelfresne Dep.).

On September 21, 1987, three days after Pelfresne followed his uncle Schiessle's directions and became the legal owner of the property, Schiessle contacted Pelfresne and told him to contact attorney Tobin Richter ("Richter") (Id. at 25). Pelfresne claims his uncle Schiessle did not tell him why he needed an attorney and that he did not ask (Id.). Instead, Pelfresne claims that he again did exactly as he was told and called attorney Richter on that same day (Id.). Pelfresne will not reveal the contents of his discussion with attorney Richter because he claims it is privileged (Id. at 26-27). Pelfresne, however, alleges that after he talked to attorney Richter, he again talked to his uncle Schiessle at which time Schiessle informed him that there was litigation concerning the property he had just purchased (Id. at 28).[1] One week later, Pelfresne commenced this action to enjoin Williams Bay from executing its raze order on the property which he owned.

ANALYSIS

In remanding this action to this court, the Seventh Circuit Court of Appeals stated:

> This may seem to conclude the case triumphantly for Pelfresne. Not so. Remem-

> ber what section 706.09(2)(b) [Wis. Stat.] says: the purchaser takes subject to any interest of which he has "affirmative and express notice" from an instrument in the chain of title. The recording system is for the protection of purchasers (including creditors) who are "bona fide" in the sense not only of purity of heart but also of some minimum degree of carefulness. The docket card showing the money judgment against Pelfresne's predecessors was an instrument in the chain of title, and the language of "affirmative and express notice" has been held [by the Wisconsin Supreme Court] not to extinguish the traditional duty of "reasonable inquiry."

Pelfresne, 917 F.2d at 1022 (emphasis added). The court of appeals was quoting and referring to the Wisconsin Supreme Court case of Kordecki v. Rizzo where the supreme court held that the purchaser of the property in dispute was: (1) charged with notice of the recorded instruments, (2) that the recorded instruments necessitated that the purchaser inquire further about the property, and (3) that the purchaser is charged with those facts which would have been discovered by a reasonable inquiry about the property. 106 Wis. 2d 713, 720, 317 N.W.2d 479 (1982).

Similar to Pelfresne in this action, the purchaser of the property in dispute in Kordecki never checked the property's chain of title prior to purchasing the property. Kordecki, 106 Wis. 2d at 715, 720. The supreme court stated, however, that had the purchaser examined the record, he would have found a lis pendens

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[1] Interestingly, but not surprisingly, Schiessle informed Pelfresne that litigation concerning the property existed even though the Walworth County Circuit Court judgment, which was the only litigation concerning the property up to that time, had become final months earlier because of the exhaustion of the defendants', which included Schiessle himself, appellate remedies. Pelfresne, 917 F.2d at 1019. Schiessle, no doubt, was referring

on file in the registry of deeds which required him to review the court file of the action involving the property. Id. at 720. The purchaser, however, argued that the court file would not have told him that the individuals he was purchasing the property from did not have the legal authority to transfer title of the property to him. Id. at 721. The supreme court disagreed with the purchaser's argument and held that the purchaser, "as a reasonably prudent person making inquiry," would also have learned about the defect in the title he was purchasing. Id.

In the present action, had Pelfresne done a title search of the property on September 18, 1987, he would have uncovered many interesting facts. First, as the court of appeals noted, in the Walworth County registry of deeds Pelfresne would have uncovered the fact that on September 17, 1987, which was either the day, or day after, his uncle Schiessle called him to sell him the property, the following events occurred: (1) a release of a lis pendens which named his uncle Schiessle as a defendant was filed; (2) a deed conveying the property from his uncle Schiessle's trust to Anita Catania ("Catania") was recorded; and (3) a deed conveying the property from Catania to Allen Veren was recorded. Pelfresne, 917 F.2d at 1019; Complaint Exh. D. Second, the registry also would have revealed to Pelfresne that his uncle Schiessle was the beneficial owner on record of the property until the day of or after he called Pelfresne. Id.

Third, had Pelfresne searched the Walworth County judgment docket,[2] he would have uncovered the fact that Walworth County had a judgment for $629.42 against (1) his uncle Schiessle and (2) Eley and Koch, who Pelfresne knew were, at one time, the trustees of his uncle Schiessle's trust and the trust for which the funds Pelfresne was going to use to purchase the property were coming from. Pelfresne, 917 F.2d at 1022; Pelfresne Dep. at 10, 17. Once these facts were discovered, a reasonable person would have asked Schiessle a few basic questions about the property which, unless Schiessle affirmatively lied in response to the questions, would in turn have revealed the existence of the raze order.

Pelfresne, however, argues that had he done a title search prior to the purchase he would not have uncovered the raze order because a title search company, not himself, would have done the search. He argues that an independent title search company would not have uncovered anything in the record which would have led to the discovery of the raze order because there was nothing technically defective in the chain of title. This argument is unpersuasive.

First, if a party's inactions forces a court to speculate, then it must consider all reasonable possibilities. In the present action, there are essentially two possibilities of what a title search would have found with the result depending on when the title search occurred. Two possibilities exist because Schiessle, Eley, and Koch's attorney in the state court action, Thomas Nedshek, did not file with the Walworth County registry of deeds a notice of dismissal of the lis pendens or the deeds conveying the property from Eley and Koch to Catania to Veren until approximately 3:30 p.m. on September 17, 1987 (Sept. 18, 1987 Brellenthin Title Search [attached to Sept. 28, 1987 Complaint as Exh. D]; Nov. 16, 1987 Matwij Aff. ¶ 4).

A title company searching the Walworth County registry of deeds prior to 3:30 p.m. on September 17, 1987 would not have uncovered Veren as being in the chain of title. Instead, he or she would have uncovered: (1) a lis pendens, with no notice of dismissal, naming Schiessle as a defendant and (2) that the recorded owners of the property were Eley and Koch, the trustees of Schiessle's trust. There is no doubt that under this scenario Pelfresne would not have tendered a check for $60,000 to Veren without asking his uncle Schiessle numerous questions which would have revealed the raze order. More importantly, if the title search were done prior to 3:30 p.m. on September 17th, then the raze order would have been uncovered in the chain of title because no notice of dismissal of the lis pendens was on file.

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2. A search of the judgment docket file is "required by the statutory [Wisconsin] definition of chain of title as including instruments recorded in the office of the clerk of the circuit court

This court must also consider what Pelfresne would have received if a title search company conducted a title search on his property after 4:00 p.m. on September 17, 1987. This court, however, need not speculate as to this fact because a search was done on the title of the property at 9:15 a.m. on September 18th, one minute after a quitclaim deed conveying the property from Veren to Pelfresne was recorded.

The title search was not requested by Pelfresne or received by him until some time after he purchased the property (Pelfresne Dep. at 22, 31, 37, 76). Not surprisingly, the search was requested by the identical attorney, Thomas Nedshek, who had filed the notice of dismissal of the lis pendens and the deeds conveying the title of the property on September 17th (Nov. 16, 1987 Brellenthin Dep. at 4; Nov. 16, 1987 Schiefelbein Dep. at 4). The title search was conducted by Joan Schiefelbein of the Security Title Company ("STC"), and the results were written up in a document entitled "#56388 - Title Search" (Nov. 16, 1987 Schiefelbein Dep. at 3; Complaint Exh. D). The title search was signed by Timothy H. Brellenthin, President of STC, and explicitly states that: (1) Schiessle was a previous owner of the property; (2) trustees Eley and Koch were previous owners of the property; and (3) Williams Bay had a judgment against Schiessle, Eley, and Koch in the amount of $629.42 (Complaint Exh. D). Thus, had Pelfresne conducted a title search within that limited window of time which he argues is relevant, he still would have uncovered: (1) the fact that his uncle Schiessle recently owned the property, (2) that numerous transfers of the property involving his uncle Schiessle had occurred, and (3) that Williams Bay had a judgment recorded against Schiessle, Eley, and Koch.

This discovery, when combined with the fact that Schiessle was telling Pelfresne to buy the property because it was such a "good worthwhile investment" (Pelfresne Dep. at 14), would lead a reasonable person to ask Schiessle, Eley, or Koch numerous questions about the property and its title. In turn, this inquiry would have most definitely uncovered the existence of the raze order, unless Schiessle, Eley, and Koch all lied to Pelfresne.

In summary, this court concludes that no matter how one hypothesizes about a title search, the record reveals that a search of the chain of title would have uncovered facts which would have required Pelfresne to inquire further about the title of the property prior to purchasing it. In addition, this court finds that a reasonable inquiry by Pelfresne would have uncovered the existence of the raze order. Thus, this court concludes that Pelfresne had inquiry notice of the raze order at the time he purchased the property, and therefore this action is barred by the Anti-Injunction Act.

IT IS THEREFORE ORDERED that this action is DISMISSED.

Dated at Milwaukee, Wisconsin, this 31st day of May, 1991.

BY THE COURT:

John W. Reynolds
Senior Judge

66.05 Razing buildings; excavations

(1)(a) The governing body or the inspector of buildings or other designated officer in every municipality, except in towns situated in a county of less than 15,000 population upon complaint of a majority of the members of the town board the circuit court, may order the owner of premises upon which is located any building or part thereof within such municipality, which in its judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, and so that it would be unreasonable to repair the same, to raze and remove such building or part thereof and restore the site to a dust-free and erosion-free condition,...

(b) Whenever a municipal governing body, inspector of buildings or designated officer determines that the cost of such repairs would exceed 50 per cent of the assessed value of such building divided by the ratio of the assessed value to the recommended value as last published by the department of revenue for the municipality within which such building is located, such repairs shall be presumed unreasonable and it shall be presumed for the purposes of this section that such building is a public nuisance.

* * *

(3) Anyone affected by any such order shall within the time provided by s.893.76 apply to the circuit court for an order restraining the inspector of buildings or other designated officer from razing and removing the building or part thereof and restoring the site to a dust-free and erosion-free conditions or forever be barred. The hearing shall be held within 20 days and shall be given preference. The court shall determine whether the order of the inspector of buildings is reasonable, and if found reasonable the court shall dissolve the restraining order, and if found not reasonable the court shall continue the restraining order or modify it as the circumstances require. Costs shall be in the discretion of the court. If the court finds that the order of the inspector of

buildings is unreasonable, the inspector of buildings or other designated officer shall issue no other order under this section in regard to the same building or part thereof until its condition is substantially changed. The remedies provided in this subsection are exclusive remedies and anyone affected by such an order of the inspector shall not be entitled to recover any damages for the razing and removal of any such building and the restoration of the site to a dust-free and erosion-free condition.

FIFTH AMENDMENT TO THE UNITED STATES-CONSTITUTION

AMENDMENT V--GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-IN-CRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

...nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

AMENDMENT XIV--CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENTS OF REPRESENTATION; DISQUALIFICATION OF OFFICES; PUBLIC DEBT; ENFORCEMENT

Section 1. ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No.

IN THE
Supreme Court Of The United States

OCTOBER TERM, 1992

DONALD W. PELFRESNE,

Petitioner,

v.

VILLAGE OF WILLIAMS BAY, a Municipal Corporation, LeMARR R. LUNDBERG, President; GEORGE JOHNSON, JAMES LOVELL, RAY LOYD, PATRICIA STEVENSON, ROBERT RAYMOND, BONNIE VAN GORDER, Trustees; VIRGINIA STENUS, Clerk; and FRANK LINDLEY, Building Inspector,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 1992, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mr. Richard Grant, Consigny, Andrews, Hemming & Grant, 303 East Court Street, P. O. Box 1449, Janesville, Wisconsin 53547. Counsel for the Respondent. I further certify that all parties required to be served have been served.

LEONARD S. SHIFFLETT
Counsel of Record
MICHAEL F. CSAR
WILSON & MCILVAINE
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Chicago, Illinois 60661
(312) 715-5000
Counsel for Petitioner

Supreme Court, U.S.
FILED
OCT 21 1992
OFFICE OF THE CLERK

No. 92-538

In The

Supreme Court of the United States

October Term, 1992

DONALD W. PELFRESNE,

Petitioner,

v.

VILLAGE OF WILLIAMS BAY, a Municipal Corporation, LeMARR R. LUNDBERG, President; GEORGE JOHNSON, JAMES LOVELL, RAY LOYD, PATRICIA STEVENSON, ROBERT RAYMOND, BONNIE VAN GORDER, Trustees; VIRGINIA STENUS, Clerk; and FRANK LINDLEY, Building Inspector,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO WRIT FOR CERTIORARI

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October 21, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. Can a judicial finding of public nuisance and demolition, both on grounds of general unreasonableness of repair and specific unreasonableness of cost of repair under Wis. Stat. § 66.05, constitute an invalid exercise of the state's police power under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

II. Can a lawful Wisconsin judgment of public nuisance and demolition bar a subsequent purchaser of real property in privity with such judgment defendant from pursuing claims for injunctive relief under the Anti-Injunction Act, 28 U.S.C. § 2283?

III. Did the Seventh Circuit Court of Appeals err in denying the subsequent purchaser's requests to amend his complaint to allege money damages or constitutional violations despite the Anti-Injunction bar and his determined privity with the Wisconsin Judgment defendant?

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STATEMENT OF THE CASE

Respondents adopt the Statement of the Case set forth by the Circuit Court of Appeals at App. 2-7.

ARGUMENT

I. THE DECISION BELOW IS FACTUAL, NOT CONSTITUTIONAL, BASED ON THE FULLY LITIGATED PUBLIC NUISANCE TRIAL AGAINST PELFRESNE'S UNCLE SCHIESSLE AND UPON THE TWO FEDERAL COURT EVIDENTIARY HEARINGS.

As framed by the Seventh Circuit (App. 4), the issue was whether the facts in the record were sufficient to establish that Pelfresne had actual or inquiry notice of the Trial and Appeals Court Raze Judgment against his uncle, Michael Schiessle, finding the subject property unsafe and unfit for habitation and unreasonable to repair. If so, Pelfresne was in privity with his uncle and the Federal Anti-Injunction Act prohibited Pelfresne's request of the Federal Court to enjoin the enforcement of Walworth County, Wisconsin Raze Judgment. (App. 5-6)

The three Seventh Circuit opinions below, cite and recite facts that inexorably lead the Court to the conclusion that Donald Pelfresne, largely on the basis of his own testimony introduced in District Court, either knew or was charged with knowing facts leading to the raze order. The case law doctrine of inquiry notice cited below (App. 5) was codified in the "good faith" requirement under Wisconsin's notice race statute, at 786.101(3). Therefore, the factual findings of the District and Appeals

Court dictated dismissal under both authorities, (and under the case law cited in its decision, App. 5-6).

The record below contained more facts than those testified to at two evidentiary hearings in Federal Court, that found Uncle Michael Schiessle deeding this property to trusts he controlled and eventually deeding directly to his nephew, supposedly without revealing the Raze Judgment recently affirmed by the Wisconsin Appeals Court (*Village of Williams Bay v. Schiessle*, 138 Wis.2d 83, 405 N.W.2d 695 (1987), cert. denied, 415 N.W.2d 162 (Wis. 1987)). There were more facts than the Seventh Circuit's finding that Donald Pelfresne "was not an independent purchaser, and simply a pawn in his uncle's game to defeat the Raze Order despite the finality of the Wisconsin Court Judgment" and when Pelfresne claimed he merely "did everything his uncle told him to do," he still had the duty to make reasonable inquiry which would have easily and surely revealed the Raze Judgment. (App. 7-8)

Introduced into the record, and considered below, were:

1. Portions of the three-day trial transcript in Walworth County, Wisconsin Court;
2. The Memorandum Decision and Judgment of Walworth County Circuit Court Judge Robert Reed against Schiessle, Ely, and Koch; and
3. The opinion of the Wisconsin Appeals Court referenced above.

The transcript makes it clear (as found by the Wisconsin Appeals Court) that testimony was received that the four subject structures were unoccupied and open to

the elements for a period of over 12 years, were so structurally unsound that the moisture in support structures was found to be all that held them up, not to mention near total violation of electrical, plumbing, heating and construction codes. (RESP. 9-10)

Furthermore, the county trial court, on this factual basis found that the building inspector's Raze Order, finding the buildings "so out of repair as to be dangerous, unsafe, insanitary, and otherwise unfit for human habitation, occupancy or use" such that "it is unreasonable to repair the same" was both reasonable and in compliance with Wis. Stat. § 66.05(1)(a). (RESP. 2, 4) Only as an additional basis for its decision does the court also find that repair cost clearly exceeds 50% of the assessed value, thereby meeting the Wis. Stat. § 66.05(1)(b) presumption of "unreasonableness." (RESP. 7-8)

Finally, the Wisconsin appeals Court (RESP. 9-10), in affirming the trial court's affirmation of the building inspector's Raze Order, found:

> "These properties were uninhabited for many years. Windows were broken and furniture was laying in the yard, making access to children easy and convenient as well as dangerous. The record discloses that children had parties in the houses and played around the furniture.
>
> Inspection revealed substantial problems with all four buildings. For instance, doors were gone; the only thing holding the lumber together in each building was moisture; there were holes in the exterior of the buildings such that a complete siding job would be needed to keep animals out; and there were defective exits

such that the porches needed repair. Additionally, there were plumbing, heating and electrical problems in all of the buildings."

These facts support the subsequent findings that the Walworth County Judgment found that these four buildings could not reasonably be repaired under Wis. Stat. § 66.05(1)(a). That finding was separate and apart from meeting the presumption of unreasonableness by cost yardstick in § 66.05(1)(b). The Seventh Circuit ruled that Nephew Pelfresne had constructive notice of these judicial findings at the time of his purchase, through his uncle, Michael Schiessle.

II. THE REASON THE SEVENTH CIRCUIT FOUND PELFRESNE'S AMENDED COMPLAINT/CONSTITUTIONAL ARGUMENTS "OF NO MERIT," IS THAT PELFRESNE IMAGINES THE "COST" OF REPAIRS *OPTION*, TO BE A § 66.05 *REQUIREMENT* AND ALSO IGNORES THE ALREADY DECIDED CASE, *POSNANSKI V. CITY OF WEST ALLIS*, 61 Wis.2d 461, 213 N.W.2d 51 (1973).

Pelfresne attempts to create a constitutional issue where none has been found to exist, by misstating the standard by which Wis. Stat. § 66.05 determines a structure to be a public nuisance, in order to even argue it fits under the "nexus" concept of *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677, 107 S. Ct. 3141 (1987). Pelfresne repeatedly mistates § 66.05 as *requiring*

demolition only if the "*cost*" of repair is "unreasonable," i.e., exceeds 50% of assessed value.[1] Repeating a misstatement of the law, does nothing to prove the statement.

The true § 66.05 standard to determine if a building is so old, dilapidated or out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, is not unreasonableness of the "*cost*" of repair. Section (1)(a) clearly states the standard to be "unreasonable to repair," for whatever reason, cost merely and obviously being one of the possible reasons.

---

[1] a. From Petitioner's statement of the case (p. 1): "Section 66.05 of the Wisconsin Statute which prohibits the repair of a dilapidated building where the cost of repair is unreasonable and requires the demolition of such buildings."

b. From Petitioner's headnote I (p. 3): "The raze order which defendants imposed on Pelfresne has the effect of prohibiting the repair of a building where the cost of repair will exceed 50% of the adjusted value . . . "

c. From Petitioner's Argument (p. 5): "Thus, the Wisconsin raze order statute links a real property owner's ability to rehabilitate and repair dilapidated housing with a dollar test."

d. From Petitioner's Argument (p. 5): " . . . the statute's arbitrary 50% of value/reasonableness requirement . . . "

e. From Petitioner's Argument (p. 7): " . . . that states such as Wisconsin which impose dollar limitations on repairs of dilapidated buildings . . . "

f. From Petitioner's Argument 9 (p. 7): " . . . the condition in this case (ie., permitted repair only if cost of repair is less than 50% of adjusted value or reasonable . . . "

g. From Petitioner's Argument (p. 8): " . . . the 50% dollar condition . . . "

h. From Petitioner's Argument (p. 10): " . . . similar mandatory demolition statutes with percentage of repair costs to value restrictions . . . "

To bootstrap his constitutional argument, Pelfresne misreads section (1)(b) of § 66.05 as inserting the word "cost" into the general "unreasonable to repair" standard of (1)(a) and misreads the clearly stated, and rebuttable "presumption" of unreasonableness solely on this "cost" factor, as a "requirement" (see footnote 1).

The Seventh Circuit finds this proposed amendment to the complaint and this imagined meaning of § 66.05 to be "of no merit" because the Wisconsin Supreme Court already ruled on this very question, in *Posnanski, supra,* p. 53:

> "It appears that the appellant herein would not argue that a municipality, under proper legislation, could not prevent the rebuilding of a dilapidated structure if the costs of so doing was unreasonable. Rather, the argument is that the selection of the benchmark of 50 percent of the formula value is an arbitrary figure unrelated to the needs of an individual case.
>
> Our reading of the statute, however, persuades us that the legislative intent was merely to create a presumption that the repairs were unreasonable if their cost exceeded 50 percent of the formula value. This is the plain and unequivocal meaning of that portion of sec. 66.05(1)(b), Stats., that provides 'such repairs shall be *presumed* unreasonable and it shall be *presumed* for the purposes of this section that such building is a public nuisance.'" (emphasis supplied)

Furthermore, as argued in section I above, the Walworth County Trial Court found these four structures

were so structurally insanitary and unsafe, it was "unreasonable to repair the same" under the § 66.05(1)(a) standard, in *addition* to finding they were unreasonable to repair under the § 66.05(1)(b) standard of unreasonable *cost* of repair. The Wisconsin Appeals Court also so found. (RESP. 1-12)

These facts and this law, cited to the District court and the Seventh Circuit at every juncture of Pelfresne's repeated requests to amend his Complaint under *Nollan, supra,* and *Penn Central Transportation v. New York City,* 438 U.S. 109 (1978) are why the courts below found the requests to be "of no merit" and "frivolous," (App. 8; *Pelfresne v. Williams Bay,* 917 F.2d 1017, 1023 (7th Cir. 1990), citing *Baker v. Mueller,* 222 F.2d 180 (7th Cir. 1955) and *City of Appleton v. Bran Schweiler,* 52 Wis.2d 303, 190 N.W.2d 545 (1972)). Since there is no "arbitrary 50% of value/reasonableness *requirement*" as imagined by Pelfresne at page 5 of his brief, there can be no failure of a "nexus" between that supposed requirement and the public safety interest under *Nollan, supra.*

III. THEREFORE THE SEVENTH CIRCUIT DID PROPERLY DETERMINE PELFRESNE'S PROPOSED AMENDED COMPLAINT HAD "NO MERIT" AND DID SO WITHIN ITS DISCRETIONARY POWERS.

Pelfresne makes clear that his Amended Complaint claims are premised upon: Williams Bay " . . . unlawfully prevented him and his predecessors in title from repairing . . . " (p. 11), that it was " . . . caused by unlawful taking" (p. 11) and that the " . . . effect of . . . Court of

appeals' affirmance is to foreclose plaintiff from challenging in this case the constitutional infirmities of the Wisconsin raze order statute" (p. 13). Obviously, Pelfresne asks the Court to allow amended causes of action that must emanate from an "unlawful" or "unconstitutional" taking that the Walworth County Trial Court, the Wisconsin Court of Appeals, the Wisconsin Supreme Court (by denial of certiorari), the U. S. District Court, and the Seventh Circuit Court of Appeals have already found to be lawful. That is why the courts below have repeatedly found Pelfresne's claims to be frivolous and of no merit, which *Foman v. Davis*[2] *supports* as reasons to deny amendment to pleadings (See quotation at Petitioner's brief p. 12).

That is why the Village of Williams Bay urges this Court to deny Pelfresne's Petition and award costs appropriate to this frivolous petition.

CONCLUSION

The decision below is well substantiated by facts found upon actual testimony, which establish inquiry notice to Pelfresne of the Raze Judgment entered against his uncle. That factual finding in turn establishes the privity effectuating the Anti-Injunction Act's prohibition against interfering with the duly tried and affirmed Wisconsin Judgment to raze these buildings.

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[2] 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed 2d 222 (1962)

Mischaracterizing the presumptive standard of unreasonableness by cost of repair in § 66.05(1)(a), destroys Pelfresne's attempt to argue unconstitutionality under *Nollan*, and *Penn Central, supra*. It also destroys his Amended Complaint claims which are necessarily *based* on an "unlawfulness" of a taking of private property, since the court here finds it to be lawful.

This petition should be rejected for the same "no merit" and "frivolous" findings made by the 7th Circuit Court of Appeals below.

Respectfully submitted,

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Counsel for Respondents

October 21, 1992

APPENDIX

STATE OF WISCONSIN
CIRCUIT COURT ROCK COUNTY

****

VILLAGE OF WILLIAMS BAY,
a political subdivision,

Plaintiff,

vs.

MICHAEL SCHIESSLE,
a/k/a MICHAEL SHIESSLE,
LOMMEN D. ELEY, and
JOHN P. KOCH

Defendants.

ORDER AND JUDGMENT

CASE NO.
85-CV-708
(Filed
June 25, 1986

****

The application for Restraining Order in the above-captioned matter having been filed by Defendants on July 23, 1985, by their attorneys Godfrey, Pfeil & Neshek, S.C., restraining the Building Inspector for the VILLAGE OF WILLIAMS BAY from proceeding under Wis. Stat. 66.05 to raise and remove pursuant to his Order, attached hereto marked Exhibit "A" and made a part hereof, and, upon the Court restraining same pending a hearing on the matter, which was held before this Court on September 24, 1985, December 3, 1985, and April 15, 1986, and the Defendants having appeared as indicated and the Plaintiff by Attorney Richard R. Grant of Consigny, Andrews, Hemming & Grant, S.C., Janesville, Wisconsin, and upon all of the evidence and filings made in this matter and the briefs of the parties and the Court having made its Findings of Facts and Conclusions of Law set

forth in the Memorandum Decision, attached hereto and marked Exhibit "B" and made a part hereof,

NOW, THEREFORE, it is hereby ordered, adjudged, and decreed as follows:

(1) That the Order of the Building Inspector for the VILLAGE OF WILLIAMS BAY dated June 3, 1985, is found reasonable and in compliance with Wis. Stat. 66.05 and any previous restraining order of this Court is hereby dissolved;

(2) That the Defendants shall have thirty (30) days from the entry of this Order to comply with said order;

(3) That, if Defendants do not so comply Plaintiff, VILLAGE OF WILLIAMS BAY, may raise and remove the buildings described in said Notice and charge cost of same against the real estate upon which said buildings are located and it shall be a lien upon said real estate and shall be assessed and collected as a special tax, together with all other rights and remedies granted VILLAGE OF WILLIAMS BAY under said statute;

(4) That Plaintiff, VILLAGE OF WILLIAMS BAY, is a duly constituted village under the statutes of the State of Wisconsin with a mailing address of P.O. Box 580, Williams Bay, Walworth County, Wisconsin, and engages in the operation of said village under Wisconsin Law; Defendant, MICHAEL SCHIESSLE, is an adult resident of 805 Northwest Highway, Parkridge, Illinois, and is engaged in the profession of law; that Defendant, LOM-MEN D. ELEY is an adult residing at 127 North Deerborn Street, Suite 631, Chicago, Illinois, and is engaged in the practice of law; that Defendant JOHN P. KOCK, is an

adult residing at 127 North Deerborn Street, Suite 631, Chicago, Illinois, and is engaged in the practice of law;

(5) That the VILLAGE OF WILLIAMS BAY is granted costs and disbursements as allowed by law and as set forth on the Bill of Costs said Village has filed herein in the sum of $629.42.

DATED this 25th day of June, 1986.

BY THE COURT:

/s/ Robert D. Read
Robert D. Read

EXHIBIT "A"

[SEAL]

VILLAGE OF WILLIAMS BAY

P.O. BOX 580

WILLIAMS BAY, WISCONSIN

ORDER OF BUILDING INSPECTOR TO RAZE AND REMOVE BUILDINGS OR PART THEREOF

TO: Michael Schiessle,
a/k/a Michael Shiessle,
Lommen D. Ely,
John P. Koch, and
Godfrey, Pfeil & Neshek, S.C.,
Attorneys for said owners

Pursuant to the provisions of Wisconsin Statutes 66.05(1)(a), you are hereby ordered to raze and remove the four (4) buildings in the back of the two houses

known as 150 and 152 Williams Street, Williams Bay, Wisconsin, all located on the property described as follows:

> A parcel of land located in the NE¼ of Sec. 1, T1N, R16E, in the Village of Williams Bay, described as follows; to wit: Beginning at the NE corner of the Bethel Block, a subdivision in said Sec. 1 T1N, R16E, and the plat of which is on record in the Register of Deeds Office in and for said Walworth County on page 281 of Volume 5 of Plats; thence N. 1° 08'W. along the West line of Williams Street 200 feet; thence s. 88° 50'W. parallel to the N. line of said Bethel Block, 264 feet, thence S. 1°08'E. 200 feet to the NW corner of said Bethel Block, thence N. 88° 50'E. along said N. line of Bethel Block, 264 feet to the place of beginning

within 20 days from the service of this Order upon you.

The buildings described above have become so out of repair as to be dangerous, unsafe, insanitary, and otherwise unfit for human habitation, occupancy or use, and it is unreasonable to repair the same.

In addition to the removal of the above-described buildings, you are ordered to repair or replace the porch adjoining the building at 152 Williams Street, Williams Bay, Wisconsin.

If you fail to comply with this order within the time prescribed, the inspector of buidings [sic] or other designated officer shall cause such buildings or part thereof to be razed and removed and shall charge the cost of such razing and removal against the real estate upon which said buildings are located and shall be a lien upon such

real estate and shall be assessed and collected as a special tax.

You are further notified that you may, within the time provided by Sec. 893.76, Wis. Stats., apply to the Circuit Court for an Order restraining the inspector of buildings or other designated officer from razing and removing the building or part thereof, or forever be barred. Should you apply to the Circuit Court for such an Order, the hearing upon your request shall be held within 20 days and shall be given preference by the Court.

DATED this 3 day of June, 1985.

/s/ Frank B. Lindley
Building Inspector

EXHIBIT "B"

STATE OF WISCONSIN: WALWORTH COUNTY:
CIRCUIT COURT:
Branch I

VILLAGE OF WILLIAMS BAY,
a political subdivision,

Plaintiff,

vs.

MICHAEL SCHIESSLE, a/k/a/
MICHAEL SHIESSLE, LOMMEN
D. ELEY and JOHN P. KOCH,

Defendants.

MEMORANDUM DECISION

File No.
85 CV 708

This application for a restraining order was filed by the defendants on July 23, 1985 in response to an order of the Village of Williams Bay building inspector, dated June 3, 1985, entitled Order of Building Inspector to raise and remove buildings or part thereof. A prior action resulting from a similar order was dismissed by the Court on August 7, 1985. A hearing was held before the Court on August 28, 1985, with the plaintiff appearing by Attorney Andrew Hack (by telephone), and the defendants appearing by Attorney Thomas Neshek. It was agreed that the old action was dismised [sic] and the most recent request for a restraining order would be placed in a new file.

The defendants also filed a request for substitution of judge and the matter as assigned to this Court on September 12, 1985. A hearing was held before this Court on September 24, 1985, with the plaintiff appearing by Attorney Richard Grant and the defendants appearing by Attorney Thomas Neshek. It was agreed by the attorneys that Lommen D. Eley and John P. Koch were the only remaining defendants to this action. This matter was continued to December 3, 1985 for further testimony and was finally concluded on April 15, 1986.

The initial briefs were received by the Court on May 6, 1986. The defendants' reply brief was received on May 12, 1986, and the reply brief of the plaintiff was received on May 16, 1986. The Court has reviewed the entire file, including the numerous photographs of the buildings in question. The Court notes that neither of the parties requested the Court to view the property, even though such a view would have been helpful in reaching the final decision in this case.

The parties disagree as to burden of proof necessary for the Court to determine whether the building inspector's order was reasonable or unreasonable. Neither side has presented any legal authority that this Court finds determinative of this issue, and therefore, the Court adopts the ordinary burden of proof, which is to a reasonable certainty by the greater weight of the credible evidence.

The Court finds from the record that the defendants have not met their burden of proof. In *Donley v. Boettcher*, 79 Wis.2d 393 the Wisconsin Supreme Court stated:

> "Neither the inspector nor the trial court can look at the building and determine the repairs needed without considering the use to which the building is to be put. The inspector and the court must comply with the general principle discussed above that the abatement of a nuisance is limited to the necessities of the case."

While the Court does not dispute or discredit or disagree with any of the testimony of the expert witness presented by the defendants, the Court agrees with the plaintiff that the necessary repairs must do more than repair these buildings to sit idle for another ten years. The buildings must be repaired so that they can be used for rental property and human inhabitation.

In viewing the photographs and the testimony, including the testimony of Mr. Goebel, the Court has no doubt that the cost of repairs for the intended use, including compliance with the building code of the Village of Williams Bay, would be far in excess of the fifty percent of the formula value as agreed to by the parties. This is true as to all four of the buildings.

Upon all the files, records and proceedings herein, the Court finds that the order of the building inspector is reasonable, not erroneous, and is fully in compliance with his statutory duties. Therefore, an order will be entered dissolving the restraining order and allowing the relief indicated in the order of the building inspector.

The defendants will have 30 days from the entry of the order signed by the Court in which to comply with the order. The attorney for the plaintiff will prepare the appropriate order and judgment consistent with the record and the findings and judgment of this Court, to be submitted to the Court as soon as possible.

Dated this 12th day of June, 1986, at Elkhorn, Wisconsin.

BY THE COURT:

/s/ Robert D. Read
ROBERT D. READ -
Circuit Judge

copy to: Mr. Grant
Mr. Neshek

No. 86-1358

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

VILLAGE OF WILLIAMS BAY,
a political subdivision,

Plaintiff-Respondent,

v.

MICHAEL SCHIESSLE a/k/a
MICHAEL SHIESSLE, LOMMEN D.
ELEY and JOHN P. KOCH,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Walworth county: ROBERT D. READ, Judge. *Affirmed.*

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

BROWN, P.J. The Village of Williams Bay successfully withstood a challenge to its building inspector's order that defendants raze and remove four buildings. Defendants appeal, claiming that the "cost of . . . repairs" does not exceed the 50% statutory formula value pursuant to sec. 66.05(1), Stats. We disagree and affirm.

The defendants are Lommen D. Eley and John P. Koch who administrate a trust benefiting Michael Schiessle. The trust holds title to the property in this action, namely four buildings in the back of two houses known as 150 and 152 Williams Street in Williams Bay.

These properties were uninhabited for many years. Windows were broken and furniture was laying in the

yard, making access to children easy and convenient as well as dangerous. The record discloses that children had parties in the houses and played around the furniture.

Inspection revealed substantial problems with all four buildings. For instance, doors were gone; the only thing holding the lumber together in each building was moisture; there were holes in the exterior of the buildings such that a complete siding job would be needed to keep animals out; and there were defective exits such that the porches needed repair. Additionally, there were plumbing, heating and electrical problems in all of the buildings.

The parties stipulated to the amount necessary to equal the 50% property value calculation under sec. 66.05(1)(b), Stats. These values are: Building 150A – $4,401.90; Building 152A – $5,502.37; Building 154 – $4,732.04; and Building 154A – $3,301.42. The building inspector concluded that the costs of repair for the buildings would far exceed these figures. It is this conclusion that is debated by the defendants.

The defendants' assertion is based upon the testimony of an architect who represented that the true cost of repair for each of these buildings was under the stipulated 50% values. The architect time and again focused upon repairs that would make the premises safe from hazards to the public. At the same time, the architect commented upon the building inspector's repair list and opined that he would disregard any listed repair cost having to do with occupancy, human habitation and use.

The architect's opinion no doubt stems from language in *Donley v. Boettcher*, 79 Wis.2d 393, 255 N.W.2d

574 (1977). In that case, the supreme court held that the list of repairs deemed necessary by the building inspector went too far. The court wrote:

> The trial court ordered Donley to install operable electrical service to the building and repair the heating and plumbing systems. These repairs relate to making the building fit for human habitation, occupancy or use. As the testimony revealed, the public would have no access to this building, and there was no evidence of harm to the public from the interior or exterior of the building if the building were closed for any uses. Because the purpose of this statute is to eliminate hazards to the public associated with old, dilapidated buildings and not necessarily to make such buildings tenantable, the trial court's remedy went beyond the necessities of the case. The repairs ordered would restore the building to a condition in which it could again be used to house a law office and barbershop. The repairs were not required to make the building which was found not to be in danger of structural collapse, safe or sanitary for the public.

Id. at 407, 255 N.W.2d at 580. As in *Donley*, the defendants here claim that the only repairs relevant are those necessary to make the buildings structurally sound such that they are not in danger of collapse and are safe and sanitary for the public. Defendants argue that the building inspector included in his list of repairs such items as faulty heating and plumbing, a new paint job and siding, lack of insulation, faulty water heater and inadequate off-street parking. The defendants conclude that their expert's narrower focus on only those repairs necessary

to eliminate the hazards to the public were germane to the issue. To add heating, plumbing and the like would be contrary to *Donley*.

As pointed out cogently by the trial court, however, the *Donley* case is easily distinguishable. In *Donley*, the owner had no intention of allowing human habitation in the building. He was not intending to again house a barbershop and law office. Since the purpose of the statute is to eliminate hazards to the public, and since the public would not be allowed in the building, the repairs necessary in that case were only those required to make the building as safe for the public as they were *intended* to be used.

Here, however, the evidence is that defendants intended to rent the property. Ads had appeared in the local paper offering the buildings for rent, which ads appeared for about four months. As the *Donley* case itself said:

> Neither the inspector nor the trial court can look at the building and determine the repairs needed without considering the use to which the building is to be put. The inspector and the court must comply with the general principle discussed above that the abatement of a nuisance is limited to the necessities of the case.

Id. The use of the buildings here was to rent the premises. To rent the premises, it is not enough to repair a building so that it is safe and sanitary; it must also be fit for habitation, occupancy and use. That is what sec. 66.05(1)(a), Stats., mandates a building inspector to take into consideration. If the purpose of the building is to

inhabit it, then it is a danger to the public if it is determined to be unfit for that purpose.

The trial court's duty is to determine the reasonableness of the building inspector's order. *Donley,* 79 Wis.2d at 406, 255 N.W.2d at 579-80; *see also* sec. 66.05(3), Stats. Whether a building inspector's order is reasonable is a question of law. *See Wassenaar v. Panos,* 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983). As in *Wassenaar,* however, the finding of unreasonableness is so intertwined with the trial court's factual findings that we will give more credence to this legal determination by the trial court than we do with other legal questions. *Id.*

The trial court applied the correct legal standard after observing the defendants' intended use of the premises. Based upon this, we affirm.

By the Court. – Judgment affirmed.

Recommended for publication in the official reports.